# Petition

81-1979

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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

SAMUEL SLIWOO,

*Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Is due process denied when evidence beyond a reasonable doubt is lacking to prove two crimes, where an intermediary who performs two acts, constituting a single offense, is subject to the Racketeer Influenced and Corrupt Organizations statute, 18 U. S. C. § 1962(c), for committing a "pattern of racketeering activity"?

II. Assuming a "pattern of racketeering activity", when acts of an intermediary end, before a conspiracy among others alone begins, causing crimes unforeseeable to him, and he is acquitted of the conspiracy, is he subject to the substantive offense under the Racketeer Influenced and Corrupt Organizations statute, 18 U. S. C. § 1962(c), for participating "in the conduct of such enterprise's affairs"?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner, by his counsel, Nicholas J. Nastasi, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

## OPINIONS BELOW

In the United States District Court, although no opinion was filed, a motion for judgment of acquittal was denied, and the Court imposed a judgment of sentence (App. A1) from which direct appeal was taken to the Court of Appeals.

The judgment order of the Court of Appeals (App. A2) was issued on February 25, 1982 and is as yet unreported. The Court denied a request for rehearing by an Order dated March 23, 1982 (App. A4) which is as yet unreported.

## JURISDICTION

A judgment of sentence was imposed by the United States District Court from which direct appeal was taken to the Court of Appeals (App. A1).

The judgment of the Court of Appeals was entered, without opinion, on February 25, 1982 (App. A2). A petition for rehearing was denied on March 23, 1982 (App. A4). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

18 U. S. C. § 1961, "Definitions", provides:

> (1) "Racketeering activity" means (A) any act . . . involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year. . . .
>
> . . .
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

18 U. S. C. § 1962(c), "Prohibited Activities", provides:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

## STATEMENT

Petitioner was indicted with three codefendants by a Federal Grand Jury for Racketeering, Conspiracy to commit Racketeering, and Gambling, 18 U. S. C. §§ 1962(c), 1962(d) and 1955. After a jury trial, Petitioner was found guilty of the single count of Racketeering, 18 U. S. C. § 1962(c). The jury acquitted him of the Conspiracy charge and the gambling offense.

This case derived from a covert investigation which was jointly conducted by the Police Department of Philadelphia, Pennsylvania and the Federal Bureau of Investigation. The single witness relied on to substantiate the charges was a police sergeant (Woodman) who had posed as a "corrupt cop." His purpose was to ensnare targeted criminal suspects by soliciting and accepting bribes from them.

The evidence reveals Petitioner's participation began when he first met with Sgt. Woodman on September 30, 1977 for the purpose of arranging a meeting between Woodman and a codefendant, Augustine Mazzio. Mazzio had expressed to Petitioner a desire to meet Woodman purportedly to pay Woodman for "protection" of an illegal lottery operation. In fact, Mazzio, having a change of heart, never met with Woodman as a result of Petitioner's effort. Mazzio, becoming suspicious of Woodman's immediate willingness to meet him, thought it was a "set-up."[1]

Instead of meeting with Woodman, Mazzio arranged to appease him by on two occasions devising to him through Petitioner the delivery of an "envelope". Peti-

1. Woodman was unsuccessful in his own overtures to meet Mazzio, which he attempted through persons other than Petitioner, until after several tries when he first met Mazzio in February of 1978 through an unindicted coconspirator.

tioner delivered the first envelope containing $35.00 on November 10, 1977, and he delivered the second envelope which contained $50.00 on December 2, 1977. Petitioner served solely as an intermediary between Mazzio and Sgt. Woodman after which the evidence undisputedly shows any connection he had with the activities proven ceased entirely.

Indeed, the record establishes that Petitioner had no further incriminating contact with Woodman or his co-defendants after the delivery of the second envelope on December 2, 1977. No other participation in the culpable activities of his codefendants by Petitioner was alleged in the indictment or shown by the evidence after the initial contacts.

By contrast, the evidence demonstrates that from December 2, 1977 until May, 1980, for an additional period of nearly thirty months, Petitioner's codefendants participated in numerous offenses, separate and unrelated to his initial activity, excluding entirely Petitioner. The balance of the evidence concerned twenty-seven bribes made by Petitioner's codefendants involving payments totalling $3,425.00. Also shown were four counts of Travel Act Offenses, 18 U. S. C. § 1952, implicating two defendants; and one count of Illegal Gambling, 18 U. S. C. § 1955, of which three defendants were convicted.

Above all, while Petitioner's function was to act as an intermediary for the purpose of protecting a single lottery operation, his codefendants' activities with Woodman exceeded the purpose for which Petitioner originally acted. Petitioner's codefendants' joint efforts included attempts to obtain investigative reports on numerous notorious crime figures; attempts to obtain advance warning of law enforcement activity directed against others; attempts to actually infiltrate the law enforcement process; and pro-

tection of a separate lottery operation conducted by yet another codefendant, Theodore Paige. It is undisputed that Petitioner had no contact whatsoever with these activities.

## REASONS FOR GRANTING THE PETITION

This case presents two significant and recurring questions requiring interpretation of the meaning and scope of two terms contained in the Racketeer Influenced and Corrupt Organization Statute, 18 U. S. C. § 1961 *et seq.* (RICO).

The application of this statute to the acts of Petitioner represents an impermissably broad reach beyond the prosecutorial purpose authorized and intended by the Congress. Its application in circumstances here has resulted in the imposition of criminal liability on Petitioner where the Government established by him neither the commission of two predicate acts nor a foreseeable participation in the affairs of a criminal enterprise as required by 18 U. S. C. § 1962(c).

Moreover, because the judgment of the Third Circuit Court of Appeals in this case permits the imposition of enhanced criminal liability[2] not for acts of the Petitioner, but for acts of others with which he had neither connection in the proofs nor a foreseeable conspiratorial concurrence, it is contrary to the decision in *United States v. Bledsoe,* 30 CRIM. L. REP. (BNA) 2489 (8th Cir., Mar. 12, 1982). This case thus creates a conflict in the decisions of two Circuit Courts of Appeals presenting an additional reason for granting this petition.

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2. The RICO statute creates a Federal offense which imposes additional liability for the commission of designated offenses existing independently as chargeable and punishable under Federal or State law. The statute provides for fines, forfeitures, and terms of imprisonment greater than those provided by the foundation offenses, two of which must be committed as necessary predicates before imposing its sanctions. For example, while Petitioner's acts constitute the offense of bribery under Pennsylvania law, punishable by up to seven years imprisonment, 18 PA. CONS. STAT. ANN. § 1103(3), under RICO he is exposed to imprisonment up to twenty years. 18 U. S. C. § 1963(a).

**I. Due Process Is Denied When Evidence Beyond a Reasonable Doubt Is Lacking to Prove Two Crimes, Where an Intermediary Who Performs Two Acts, Constituting a Single Offense, Is Subject to the Racketeer Influenced and Corrupt Organizations Statute, 18 U. S. C. § 1962(c), for Committing a "Pattern of Racketeering Activity".**

It is undisputed that Petitioner's participation in the criminal activities proven was limited to his acting initially and exclusively as an intermediary in delivering two envelopes which combined contained $85.00. Construing the proofs in a light most favorable to the Government, the jury could infer the purpose of the payments was to purchase police protection which classicly constitutes bribery under Pennsylvania law.[3] See, 18 PA. CONS. STAT. ANN. § 4701, "Bribery in Official and Political Matters".

In order to justify including Petitioner in the substantive RICO offense, it was necessary to allege two predicate acts as defined by 18 U. S. C. § 1961(5), and as required by 18 U. S. C. § 1962(c). The indictment was thus crafted to treat each payment he delivered as a separate bribery offense.

The fallacy inherent in such a charging mechanism presents the first issue here. While the separate delivery of two envelopes constitutes two discrete acts, the offense of bribery in this case consists not in the number of envelopes delivered, but, rather, in the purchase of a promise from a policeman to refrain from performing his duty.

The gist of the offense is an omission of duty in exchange for a consideration, not the method of paying. Whether multiple bribes are committed is a determination

3. The law of Pennsylvania is incorporated in this RICO prosecution by operation of the indictment pursuant to 18 U. S. C. § 1961(1)(A), requiring "racketeering activity" to be "chargeable under State law".

arrived at not simply by counting the number of payments; rather, the analysis consists of finding if each payment relates to a distinct interval of time intended to be covered by it.

This contention is best illustrated by reference to a hypothetical: Suppose two neighboring store owners observe that trade is discouraged by parking citations issued for motor vehicles parked in front of their businesses. Each of them, intending to eliminate the problem for a year's interval, enters into an arrangement with the traffic policeman for protection covering a year. One pays the policeman $10.00 a week for a year in consideration for the officer's failure to issue parking violations. The other gives the same officer $520.00 in one payment for the identical service. Applying the theory of prosecution which was used in this case, the more impecunious merchant, who, let us assume, can afford only $10.00 a week, has committed fifty-two predicate offenses, more than the two which are needed—supposing other jurisdictional requirements—to indict him under RICO. The other merchant may be prosecuted only for making a single bribe. It is doubtful the Congress intended that bribery by installment, for that reason alone, should result in the more severe liability of a RICO prosecution.

Moreover, the error in proscribing Petitioner's acts as a "pattern of racketeering activity" under the RICO statute is illustrated by the law of Pennsylvania which is a necessary element of the charge in question. 18 U. S. C. § 1961 (1)(A).

*Commonwealth v. Clark*, 238 Pa. Super. Ct. 444, 357 A. 2d 648 (1976), *allocatur denied* July 9, 1976, concerned a state prosecution for sixteen counts of corrupt solicitation and bribery. The purpose of the defendant's criminal acts was to obtain protection for an illegal narcotics operation. While the Court rejected factually the defendant's argu-

ment that his sixteen separate payments constituted a single criminal episode, it recognized that numerous payments may, as a matter of law, constitute a single criminal act.

Under Pennsylvania law whether separate payments constitute a single offense or multiple bribes depends on the time period designated by the intent and purpose of the parties. The purpose for which the payments are made and interval of time covered determine the number of offenses. The number of payments alone is insufficient to make this determination.

Because the evidence in this case established merely the delivery of two payments, there was insufficient proof to determine that two offenses were committed. While Petitioner transferred two envelopes, there is no evidence showing the understanding of either Woodman or Mazzio about the interval or intervals of time covered by each or both of these payments.

The first envelope, delivered on November 10, 1977, contained $35.00; the second envelope, delivered on December 2, 1977, contained $50.00. Each of these amounts is nowhere shown in the evidence to relate to a time period. A time interval was required to be proven to make out two bribery offenses. *Commonwealth v. Clark, supra.*

In contrast, payments made by Petitioner's codefendants after December 2, 1977 were almost invariably in the sum of $50.00 or in even multiples thereof. Above all, the evidence expressly showed that each payment related to a "monthly" interval of corresponding protection.[4] The

4. It is anticipated that the Government may argue, in retrospect of a later agreement expressed between Woodman and Petitioner's codefendants, that the November 10th envelope containing $35.00 represents a monthly payment of $50.00 with a deduction of approximately one-third for the expiration of the first ten days of

proof thereby fails as a matter of law to establish the existence of two predicate acts as required under the RICO statute. Thus reversal is required as a result of a fundamental failure in the proof. See, *Mullaney v. Wilbur*, 421 U. S. 684 (1975); *In re Winship*, 397 U. S. 358 (1970).

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4. (Cont'd)

that month, and that the December 2nd envelope in the sum of $50.00 was to cover that month. Any inference imputing to Petitioner knowledge of a time interval covered by his acts should be impermissable because he had no knowledge of any such understanding between Mazzio and Woodman. When he made the two payments they had not met each other. Indeed, at the time Petitioner acted he was an intermediary. It is unfair to impute knowledge of a time interval covered by his earlier acts by inferring from a later agreement expressly shown between Mazzio and Woodman after Petitioner ceased any part in their dealings. Thus, it may not be argued that because the later understanding required monthly payments, Petitioner should have known, when acting as an intermediary, the payments he delivered were to cover monthly intervals. Moreover, the evidence nowhere shows Petitioner knew the sums of money contained in the envelopes he delivered. Construing the evidence most favorably to the Government, the only permissible inference to be drawn from Petitioner's activities is that he knew he delivered money on the dates he delivered envelopes, without any knowledge of the sum he delivered, nor could his knowledge of the dates on which deliveries were made impute to him understanding that the intervals of time covered were monthly because the deliveries occurred on diverse dates when such an inference could make no sense.

**II. Assuming a "Pattern of Racketeering Activity", When Acts of an Intermediary End, Before a Conspiracy Among Others Alone Begins, Causing Crimes Unforeseeable to Him, and He Is Acquitted of the Conspiracy, He Is Not Subject to the Substantive Offense Under the Racketeer Influenced and Corrupt Organizations Statute, 18 U. S. C. § 1962(c), for Participating "in the Conduct of Such Enterprise's Affairs".**

The Government presented no proof showing a knowing or foreseeable participation by Petitioner in the affairs of an "enterprise." The evidence, considered most favorably to the Government, establishes only that Petitioner knew his codefendant, Mazzio, to be in the illegal lottery business; that he acted in Mazzio's behalf in seeking unsuccessfully to introduce Woodman; and that Petitioner knowingly delivered two envelopes to Woodman which were for the purpose of "protection".

Quite simply there is no other evidence involving Petitioner in the balance of activities which make up the Government's case.

We do not contend that Petitioner should have had a separate trial; we do contend that his offense was improperly charged under the mantle of the RICO statute, thereby seeking to impose enhanced liability exceeding that which is proper for the degree of his participation and culpability.

The Petitioner's acts constituted no more than aiding and abetting in the commission of bribery. It is indisputable that his acts occurred and ended before the later activities of his codefendants which were unforeseeable to him. Even so, the jury, once acquitting Petitioner of conspiracy, was left with the substantive RICO count as the sole alternative for convicting him of his acts because the indictment contained no separate substantive offense charging bribery.

It is plausible and reasonable that had there been a charge of bribery, Petitioner would have been convicted of that offense alone, in view of the jury's finding, by acquitting him of the conspiracy count, that Petitioner did not enter into the criminal agreement it found among only his codefendants.

While the Third Circuit Court here permits the imposition of RICO liability for acts which are not foreseeably related to affairs of the "enterprise", the Eighth Circuit Court, in *United States v. Bledsoe, supra,* has rejected use of the statute for acts with even less an attenuated relation to an enterprise.

In *Bledsoe* the Court stated:

> (U)nder the Government's argument, any confederation, no matter how loose or temporary, of two or more individuals committing two or more sporadic crimes which are predicate crimes under RICO provides a basis for prosecution under the Act. ° ° ° Although several courts have accepted this loose construction of RICO, we believe that the legislative history of the statute and an analysis of the statute itself as well as the surrounding criminal law indicates that such a broad construction is not warranted.
>
> . . .
>
> Although commonality of purpose may be the *sine qua non* of a criminal enterprise, in many cases this singular test fails to distinguish enterprises from individuals merely associated together for the commission of sporadic crime. ° ° ° This suggests that an enterprise must exhibit each of three basic characteristics.
>
> In addition to having a *common or shared purpose* which animates those associated with it, it is

> fundamental that the enterprise "*function as a continuing unit.*" . . . What is essential . . . is that there is some continuity of both structure and personality. . . .
>
> Finally, an enterprise must have an "*ascertainable structure" distinct from that inherent in the conduct of a pattern of racketeering activity.* . . . . 30 CRIM L. REP. at 2489-2491 (emphasis supplied).

*Bledsoe* recognizes that members of an enterprise must share a common purpose among themselves whether the charge be for conspiracy, which requires an additional showing of an agreement, or for the substantive offense of RICO.

Thus, the Eighth Circuit Court concluded:

> "We find no real evidence of a structure, a pattern of authority or control, or of continuity in the pattern of association or the common purpose of all of the defendants." 30 CRIM. L. REP. at 2491.

Criminal liability should be imposed only for the foreseeable consequences of an act whether it be in the context of a conspiratorial agreement or in the context of establishing participation in a racketeering enterprise.[5]

5. By acquitting Petitioner of the RICO conspiracy charged, the jury found he was not party to the conspiratorial agreement proven, because the evidence shows he merely transferred two payments. There is no evidence to show that these acts—which under Pennsylvania law, as shown in Section I, *supra*, constitute a single act of bribery—were made with any intent to be part of or in furtherance of the later criminal enterprise established by the evidence against Petitioner's codefendants. In *United States v. Griffin*, 660 F. 2d 996 (4th Cir. 1981), the Court recognized, in a prosecution for conspiracy and a substantive RICO charge, that both offenses "share the basic characteristic that each proscribes purposeful associations of individuals", 660 F. 2d at 1000. Accordingly, the Court cautioned there is the ever present danger of finding "guilt by association" without regard to an individual's own acts or purposes.

There is no showing of an intent by the Congress to strip this essential safeguard from the substantive RICO offense; to assume such a Congressional intent would raise serious constitutional questions.

In *United States v. Peoni*, 100 F. 2d 401 (2nd Cir. 1938), Judge Learned Hand provided a classic statement of the necessary limitation on individual criminal liability which arises from separate acts of conspirators:

> At times it seemed to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. *Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it*; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it. . . . 100 F. 2d at 403 (emphasis supplied).

The essence of a conspiracy is found in sharing a common purpose. The nature of the agreement is the keystone of conspiracy, not the mere occurrence of even culpable acts for others, which are concluded before an unforeseeable agreement among only them causes offenses exceeding the reasonable import of one's acts.

Thus, under well established principles of conspiracy law:

> (T)he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which con-

> stitutes the conspiracy which the statute punishes. . . . *Braverman v. United States,* 317 U. S. 49, 53 (1942).

The criminal liability of an individual, when acting in concert with others, is therefore limited by the nature or purpose of the agreement.

For example, one is not liable for a crime committed by a coconspirator when the offense was neither part of the agreement nor in furtherance of it. *Pinkerton v. United States,* 328 U. S. 640 (1945). As stated by the Court:

> A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or were merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement . . . . 328 U. S. at 647-648.

Similarly, in a RICO conspiracy it is recognized that an agreement to participate does not impose liability on one for unforeseeable criminal acts of conspirators committed by them in furtherance of the enterprise. *United States v. Winter,* 663 F. 2d 1120 (1st Cir. 1981). The Court stated:

> We, therefore, hold that a RICO conspiracy count must charge as a minimum that each defendant *agreed to commit* two or more specified predicate crimes in addition to charging *an agreement to participate* in the conduct of an "enterprise's" affairs through a "pattern of racketeering activity." 663 F. 2d at 1136 (emphasis supplied).

The Fourth Circuit Court also has adopted this rationale and requires a "common purpose" among the conspirators be established. Thus, in *United States v. Griffin, supra* note 5, it stated:

> While within the resulting statutory scheme conspiracy remains conspiracy and an associated-in-fact enterprise is plainly intended to be something different and less difficult of proof, *they nevertheless continue to share the basic characteristics that each proscribes purposeful associations of individuals.* It is this shared characteristic that has created the special danger that in conspiracy prosecutions guilt will not be assessed on an "individual and personal" basis, *Kotteakas (sic) v. U. S.*, 328 U. S. 750, 772 (1946), but solely by association. . . . 660 F. 2d at 1000 (emphasis supplied).

Consequently, applying these criteria to this case would require a reversal and dismissal of this indictment by application of traditional safeguards associated with conspiracy law. The same result is required for the improperly expansive application of the substantive RICO offense which convicted Petitioner.

Review is necessary in this case both because this Court has not determined limits for the imposition of liability under RICO[6] and because of the conflict in decisions of the Third and Eighth Circuit Courts concerning the important issues presented.

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6. In *United States v. Turkette*, — U. S. —, 101 S. Ct. 2524 (1981), this Court held that an "enterprise" may be an association of individuals engaged entirely in illegal business. The instant case presents questions in direct sequence to issues implicated, but not presented, in *Turkette* which are similar to questions that have confronted other Courts since its decision. See, e.g., *United States v. Winter, supra* (mantle of RICO statute may not be used to join in a conspiracy an individual whose participation is disproportion-

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

NICHOLAS J. NASTASI
*Counsel for Petitioner*

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6. (Cont'd.)

ate to the agreement of his codefendants; reversal of conviction for conspiracy and substantive RICO offense); *United States v. Sutherland*, 656 F. 2d 1181 (5th Cir. 1981) (multiple conspiracies may not be tried together under a single RICO conspiracy count). The issues to be resolved are whether even the most attenuated connection with an illegal enterprise is sufficient to subject one to RICO liability and, secondly, when do unlawful acts constitute participation in the affairs of an illegal enterprise. Guidance by this Court is needed in this context because of the vague nature of an illegal enterprise as compared with the more exact structure of a legal-business-enterprise.

# Appendix

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

---

CRIM. 80-291-4

---

UNITED STATES OF AMERICA

*v.*

SAMUEL SLIWOO

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**JUDGMENT AND PROBATION/COMMITMENT ORDER**

(O)n this date, March 6, 1981 . . . (t)here being a verdict of guilty. Defendant has been convicted as charged of the offense of Racketeer Influenced and Corrupt Organizations as charged in Count 2, Title 18 U. S. C. § 1962(c) . . . . The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of . . . . one (1) year and one (1) day and pay a fine of $1,000.00 within 30 days under Count 2 . . . .

/s/ ALFRED L. LUONGO
*United States District Judge*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 81-1609 & 81-1611

---

UNITED STATES OF AMERICA

*v.*

AUGUSTINE MAZZIO, a/k/a Gus,
Appellant in No. 81-1609

SAMUEL SLIWOO,
Appellant in No. 81-1611

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Crim. No. 80-00291-01 & 04

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Submitted Under Third Circuit Rule 12(6)
February 19, 1982

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Before: ADAMS and SLOVITER, *Circuit Judges*, and STERN, *District Judge*.*

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* Hon. Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

## JUDGMENT ORDER

After consideration of all contentions raised by appellants, namely, that (1) the trial judge erred in his supplemental instructions to the jury by stating that the defense of entrapment was apposite only if defendant was wholly innocent and by reducing the inquiry to an assessment of the relative credibility of the government's and the defense's positions; (2) the trial judge committed prejudicial error by his failure to grant a separate trial for the defendant Samuel Sliwoo; (3) the prosecutor's cross-examination of the defendant Sliwoo's character witnesses improperly invaded the province of the jury and denied Sliwoo an opportunity to present his defense; (4) the prejudicial and inflammatory comments of the prosecutor in his closing statements constitute reversible error; and (5) the government indictment and trial of the defendant Sliwoo pursuant to the RICO Statute, 18 U.S.C. §§ 1961, *et seq.* was unconstitutional as applied and an attempt to circumvent the general law of conspiracy and Fed. R. Crim. Pro. 8 and 14, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

ATTEST
/s/ SALLY MRVOS
Sally Mrvos, Clerk

DATED: February 25, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 81-1611

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UNITED STATES OF AMERICA

*v.*

SAMUEL SLIWOO,

Appellant

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(Crim. No. 80-00291-04)

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**ORDER**
**SUR PETITION FOR REHEARING EN BANC**

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Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*, and STERN, *District Judge*.*

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The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

* Hon. Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

Dated: March 23, 1982

# Opposition

Office - Supreme Court, U.S.
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No. 81-1979

# In the Supreme Court of the United States

OCTOBER TERM, 1981

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SAMUEL SLIWOO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the evidence proved that petitioner committed two separate acts of racketeering activity, as required for conviction under 18 U.S.C. 1962(c).

2. Whether the evidence proved that petitioner participated in the affairs of an enterprise through a pattern of racketeering activity, as required by 18 U.S.C. 1962(c).

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### OPINION BELOW

The judgment of the court of appeals (Pet. App. A2-A3) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 25, 1982. The petition for a writ of certiorari was filed on April 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering

activity, in violation of 18 U.S.C. 1962(c).[1] Petitioner was sentenced to imprisonment for one year and one day and was fined $1,000. The court of appeals affirmed (Pet. App. A2-A3).

Petitioner was a police officer assigned to the Third Police District in Philadelphia. Jack Woodman was a police sergeant who had previously served as petitioner's supervisor and who was assigned to the organized crime plain clothes unit at the time of the events charged in the indictment (1 Tr. 53).[2] Co-defendant Augustine Mazzio operated a numbers business and was one of the targets of Woodman's investigation (1 Tr. 47-48). In September 1977, petitioner twice told Woodman that Mazzio wanted to talk to him. On each occasion, Woodman responded in a noncommittal manner and then reported the conversations to his superiors. Thereafter the FBI was contacted, and a joint investigation was begun (1 Tr. 51-55). In late September, a third request by Mazzio for a meeting was transmitted through petitioner to Woodman. Woodman said that he was not sure that he could attend such a meeting. Later that day, Woodman saw petitioner talking with Mazzio, and petitioner subsequently informed Woodman that Mazzio would not be able to meet with him (1 Tr. 51-56).

On September 30, Woodman, equipped by the FBI with a body recorder, met with petitioner on a street. Petitioner said that he would pick up payments from Mazzio intended for Woodman "when I pick up our regular note." Woodman asked to deal di-

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[1] Petitioner was acquitted of conspiracy to violate the RICO statute (18 U.S.C. 1962(d)) and of operating an illegal gambling enterprise (18 U.S.C. 1955).

[2] "Tr." refers to the nine volume trial transcript.

rectly with Mazzio, but petitioner stated that Mazzio felt it was easier to put Woodman's payments on petitioner's "tab" with the understanding that petitioner would then make the payments to Woodman. Woodman, however, continued to press for direct contact with Mazzio (Govt. Exh. 1A). Later that day, petitioner told Woodman that he had spoken with Mazzio's nephew, co-defendant Leon Mazzio, who had agreed to discuss Woodman's request with his uncle (Govt. Exh. 1A-1).

In mid-October, petitioner told Woodman that Mazzio did not want to meet with him because he feared that Woodman might be working with federal authorities and might be "wired" (1 Tr. 77-78). Petitioner noted that Mazzio was concerned about a number of strangers in the area who he suspected might be FBI agents (Govt. Exhs. 2A, 3A). In late October, petitioner informed Woodman that Mazzio wanted to meet with him and that Woodman should contact Leon Mazzio to make the arrangements. Woodman contacted Leon Mazzio, but no meeting was arranged (Govt. Exhs. 5A, 6A). On November 8, petitioner told Woodman that Mazzio had decided not to deal with Woodman personally and that Woodman would have to deal through petitioner (Govt. Exh. 7A).

On November 10, petitioner made his first cash delivery—$35—to Woodman. Petitioner initially attempted to deliver the payment while in his patrol car. Petitioner stuck the envelope out the window and waved it at Woodman. However, Woodman insisted on a less conspicuous transaction, and the money was delivered at another location (Govt. Exhs. 9A, 9A-1; Tr. 100-103). Woodman subsequently complained to Leon Mazzio about petitioner's indiscretion in publicly waving the bribe money. Woodman stated

that he no longer wished to deal with petitioner as Mazzio's intermediary (Govt. Exh. 10A). In early December, petitioner told Woodman that Mazzio had been advised by his nephew of Woodman's complaint but still refused to deal directly with Woodman. Woodman asked if petitioner had another payment for him, and petitioner said no (Govt. Exh. 13A). The next day, petitioner delivered $50 to Woodman. When Woodman asked whether they would meet on a weekly basis, petitioner stated that they would meet "whenever we get it," *i.e.*, the payoff money (Govt. Exh. 15A; 2 Tr. 39-41).

Woodman finally succeeded in dealing directly with Augustine Mazzio in early December 1977. At Mazzio's request, Woodman and Mazzio met in the rear of a jewelry store. Mazzio acknowledged that he was the source of the previous payoffs and told Woodman that future payoffs would be made on the first of each month by Leon Mazzio, rather than petitioner. Mazzio explained that he wanted Woodman to provide information concerning law enforcement surveillance that had been disrupting the conduct of Mazzio's numbers operation (Govt. Exh. 16A). Woodman continued to receive payoffs from the Mazzios, as well as from co-defendant Theodore Paige. In return, Woodman provided information that the FBI had agreed to release (2 Tr. 44-45, 63-64, 105-118). No further payments were made by petitioner to Woodman following the commencement of Woodman's direct dealings with the Mazzios.

## ARGUMENT

1. Petitioner contends (Pet. 7-10) that his two deliveries of bribe payments to Woodman constituted a single offense and therefore that he did not commit the two predicate acts of racketeering activity

required for conviction under 18 U.S.C. 1962(c). There is no merit to petitioner's claim.

18 U.S.C. 1962(c), a provision of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. 1961 *et seq.*, is violated when a person associated with an enterprise participates directly or indirectly in the conduct of the enterprise's affairs through "a pattern of racketeering activity." A pattern of racketeering activity is defined, in turn, as two or more "acts of racketeering activity" (18 U.S.C. 1961(5)), including "any act * * * involving * * * bribery * * * which is chargeable under State law and punishable by imprisonment for more than one year" (18 U.S.C. 1961(1)(A)). Under Pennsylvania law, the bribes delivered by petitioner to Woodman were chargeable as felonies and punishable by imprisonment for more than one year (see 18 Pa. Cons. Stat. Ann. § 4701 Purdon 1973). They therefore qualify as predicate crimes under RICO. Petitioner acknowledges that his bribery of Woodman constitutes a predicate offense but contends that the two separate payments should be treated as a single offense and that consequently he did not commit the two predicate crimes required by the RICO statute (Pet. 7). Relying upon *Commonwealth* v. *Clark*, 238 Pa. Super. Ct. 444, 357 A.2d 648 (1976), petitioner maintains (Pet. 8-10) that the proof at trial established, not two separate bribes, but a single criminal agreement with two installment payments. In fact, however, *Clark* makes it clear that petitioner was guilty of two separate acts of bribery under Pennsylvania law.

In *Clark* the defendant was convicted of 16 counts of bribery for making 16 separate payments to a police officer so that the narcotics squad would not interfere with the activities of his criminal associates. The defendant's convictions were affirmed because it could be

inferred that "each payment was to buy a certain period of protection" (238 Pa. Super. Ct. at 447, 357 A.2d at 650). The same is true in this case. The controversy among Woodman, petitioner, and the Mazzios concerning who would act as Augustine Mazzio's intermediary demonstrates a common understanding that Woodman's relationship with the Mazzios was to be a continuing one, with bribe payments to be made at regular intervals. In addition, while petitioner was acting as Augustine Mazzio's intermediary, he explained to Woodman that Woodman's bribe payments would be put on petitioner's monthly "tab." This likewise indicated that the payments were part of a regular payoff schedule and that each payment was intended to purchase a specific period of protection. There is nothing in the record to suggest that petitioner and Mazzio entered into a single agreement covering a finite period of time and that the two payments delivered by petitioner were merely installments of a sum upon which the parties had previously agreed. Thus, under *Clark*, petitioner was guilty of two separate acts of bribery. See also *United States* v. *Anderson*, 509 F.2d 312, 333 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975); *Patton* v. *United States*, 42 F.2d 68 (8th Cir. 1930). In any event, whether each payment was a separate act of bribery or merely an installment paid pursuant to a single illegal agreement "is largely a question of fact" (*Commonwealth* v. *Clark*, *supra*, 238 Pa. Super. Ct. at 447, 357 A.2d at 650) and, accordingly, does not warrant further review by this Court.

2. Petitioner also contends (Pet. 11-16) that his conviction should be reversed because the evidence did not establish his "knowing or foreseeable participation * * * in the affairs of an 'enterprise' " (Pet. 11). Petitioner's claim is frivolous.

Petitioner does not challenge the sufficiency of the evidence showing the existence of an enterprise that engaged in illegal gambling and bribery. He does not challenge the sufficiency of the proof that he made bribe payments on behalf of the enterprise. He does not claim that he did not know the nature and scope of the enterprise's activities when he participated in its affairs. He maintains (Pet. 11-16), however, that his association with the enterprise was so brief that he could not have foreseen the enterprise's future acts. His argument is both legally irrelevant and contrary to the facts. First, petitioner's conviction was based upon his own acts of racketeering activity, not upon any previous or subsequent acts committed by others. Therefore it is entirely irrelevant whether petitioner could have reasonably foreseen the later acts of others. Moreover, there is nothing in the record suggesting that petitioner ever withdrew from participation in the enterprise's affairs. Second, the events that occurred after the two bribes delivered by petitioner were entirely foreseeable. Petitioner knew that the enterprise paid bribes—the record shows that he regularly delivered bribe payments on its behalf—and he was aware that Woodman wanted to deal directly with the Mazzios. Thus, it was certainly not unforeseeable that Woodman would receive future bribe payments directly from the Mazzios, who headed the enterprise.

Nor can petitioner draw any support from *United States* v. *Bledsoe*, 674 F.2d 647 (1982), petition for rehearing pending, Nos. 80-1998 to 80-2001, and 80-2114 (8th Cir.) upon which he relies (Pet. 12-13). In *Bledsoe*, defendants were charged with RICO offenses on the basis of various fraudulent stock transactions conducted through several farm cooperatives. The court of appeals found that the proof failed

to establish the existence of an "enterprise" within the meaning of the statute. The court stated (674 F.2d at 665; citation omitted) that an "enterprise" must have "a common or shared purpose which animates those associated with it, * * * some continuity of both structure and personality," and "an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity." This case meets all those requirements and presents the very type of structured criminal enterprise at which the RICO statute was directed, *i.e.*, a gambling operation that engaged in bribery for its own protection. The enterprise had a well-defined structure, with Augustine Mazzio at the top and Leon Mazzio as his trusted lieutenant. One sub-group handled the gambling operation while another, in which petitioner participated, attempted to ensure that there would be no interference from the authorities. Thus, the instant case presents a classic example of a RICO enterprise.[3]

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[3] Petitioner's reliance on *United States* v. *Winter*, 663 F.2d 1120 (1st Cir. 1981), petition for cert. pending, No. 81-1392, and *United States* v. *Griffin*, 660 F.2d 996 (4th Cir. 1981), cert. denied, No. 81-5780 (Jan. 11, 1982), is similarly misplaced. In *Winter*, the court held (663 F.2d at 1136) that a defendant may not be convicted of conspiring to violate the RICO statute unless he agreed to commit two or more predicate offenses. Here, petitioner was not convicted of conspiring to violate RICO, and he actually committed two predicate crimes. In *Griffin*, the court stated (660 F.2d at 1000) that RICO conspirators must share a "common purpose." Again, petitioner was not convicted of RICO conspiracy, and the record shows that he and others who participated in the enterprise's affairs had the common purpose of committing bribery and furthering the illegal gambling operation.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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